FORM NLRB-4477
(7-95)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

BERNARD CARE CENTER, L.L.C.[1/]

Employer

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2000, AFL-CIO, CLC

Petitioner

Case 14-RC-12358

REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[2/]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6*)* and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:[3/]

All full-time and regular part-time certified medical technicians employed by the Employer at its St. Louis, Missouri facility, EXCLUDING office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike

began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

Service Employees International Union Local 2000, AFL-CIO, CLC

ELECTION NOTICES

In accordance with Section 102.30 of the Board's Rules and Regulations, the Employer shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. These notices are to remain posted until the end of the election. Failure to post the election notices as required will be grounds for setting aside the election whenever proper and timely objections are filed. A party is estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice. As used in this paragraph, the term "working day" means an entire 24-hour period excluding Saturdays, Sundays, and holidays.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director for Region 14 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at 1222 Spruce Street, Room 8.302, Saint Louis, Missouri, on or before **June 18, 2002**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **2** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.). If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **June 25, 2002**.

Dated June 11, 2002

at Saint Louis, Missouri

Mary J. Tobey, Acting Regional Director, Region 14

1 The Employer's name appears as amended at hearing.

2 The Employer, Bernard Care Center, L.L.C., is engaged in the operation of a nursing home providing health care for the sick and infirm.

3 The Petitioner seeks a unit consisting of all full-time and regular part-time certified medical technicians (CMTs) employed by the Employer at its St. Louis, Missouri facility, excluding all office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees. Contrary to the Petitioner, the Employer contends that the petition should be dismissed. Initially, the Employer contends that the six CMTs are supervisors in that they responsibly direct the Certified Nursing Assistants (CNAs), and have the authority to discipline employees and to adjust grievances. The Employer further contends that if the CMTs are found not to be supervisors, that the CMTs share such a strong community of interest with the CNAs that the only appropriate unit would be one including both CNAs and CMTs. The CNAs are currently represented by Local 50, Service Employees International Union, AFL-CIO, CLC (Local 50) in a certified unit. Local 50 is not a party to this proceeding and has expressed no interest in representing the CMTs. For the reasons discussed below, I find that the CMTs are not supervisors and that the petitioned-for unit is appropriate.

Supervisory Status

As the Employer asserts that the CMTs are supervisors, the Employer has the burden of proving their supervisory status. *Kentucky River Community Care, Inc*., 121 S.Ct. 1861, 1866 (2001). In addition, the Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997) Moreover, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory authority and a lack of evidence is construed against the party asserting supervisory status. *Sears, Roebuck & Co*., 304 NLRB 193 (1991); *Michigan Masonic Home*, 332 NLRB No. 150 (2000) Supervisory status will not be found when the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989) The Employer provides no evidence that the CMTs can hire, fire, layoff, recall, promote, or reward employees, approve overtime, or that they can effectively recommend such actions. Moreover, the CMTs have not been told that they are supervisors, they do not attend supervisors' meetings or receive supervisory training, and they are paid hourly like other non-supervisory employees. Therefore, this analysis is limited to the Employer's contentions that CMTs responsibly direct the CNAs, have authority to discipline employees and adjust their grievances, or to effectively recommend such actions.

Responsible Direction

The primary duties of the CMTs are to pass medication, pass food, assist with feedings, and otherwise help CNAs when they need help. In addition, CMTs are scheduled between two to three times a month to be in charge of one of the four floors in the facility. As the charge on the floor, the CMT has some additional charting duties, is responsible for calling the doctor if an incident occurs, and makes rounds to ensure that CNAs have completed their duties. The CMTs are not involved in the assignment of work to the CNAs as the CNAs are assigned to specific patients and rooms without the input of the CMTs, and the CNAs know what their job duties are. However, whether serving as the charge or not, if the CMT observes that a patient needs care, the CMT so informs the CNA assigned to that patient. Examples in the record of directions given by a CMT to a CNA were to change a resident because that resident had soiled clothing or to pass out trays of food to residents. However, the record also establishes that CNAs will inform a CMT that a resident has not received his medication on time. While the record establishes that the Employer expects the CNA to follow a CMT's instructions, the CMT's only course of action in the event a CNA fails to follow the instruction is to report the incident to a supervisor, such as the Director of Nursing.

The Employer has failed to present sufficient evidence that the CMTs are supervisors because they responsibly direct the CNAs at the facility. The only evidence proffered of direction is that if a CMT observes a patient in need of care, the CMT so informs the CNA assigned to that patient. There is no evidence that the CMTs are involved in the assignment of CNAs to a particular patient, that the CMTs can change those assignments, or that the CMTs instruct the CNAs as to the manner in which the tasks will be performed or method to be used. In these circumstances, the Employer has failed to establish that the CMTs utilize any independent judgment in the direction of the CNAs' work. Independent judgment cannot be inferred from the evidence that CMTs merely advise CNAs of neglected tasks. *Kentucky River*, supra; *Sears, Roebuck & Co*., supra; *Michigan Masonic Home*, supra; *Vencor Hospital,* supra

Discipline

The Employer asserts that the CMTs have the authority to verbally counsel CNAs and that the CMTs can effectively recommend further discipline. The record establishes that if a CNA refuses to perform a neglected task, the CMT will warn the CNA that the refusal will be reported to the Director of Nursing. The CMT does not keep any written account of this warning, and the Director of Nursing is not notified of the warning if the CNA performs the task. If the CNA continues to refuse to perform the task, the CMT reports the refusal to the Director of Nursing. The CMT does not offer and is not asked for a recommendation on the scope, level, or need for discipline. In determining whether or not the situation warrants discipline, the Director of Nursing speaks to all employees to get their version of the events.

Where written or oral reports simply bring substandard performance to the Employer's attention, and where an admitted supervisor conducts an independent investigation, the CMT's role in advising the supervisor of conduct is merely a reportorial function and not supervisory. *Passavant Health Center*, 284 NLRB 887, 891 (1987) Accordingly, I find

that the CMTs do not have the authority to discipline or effectively recommend discipline within the meaning of Section 2(11) of the Act.

Authority to Adjust Grievances

At hearing, the Employer's Director of Human Resources testified that a meeting between a CMT and CNA would be considered to meet the requirements of the first step of the contractual grievance procedure which provides that the employee must first present the grievance to his/her immediate supervisor. However, no evidence was presented that this has ever happened or that if it did happen, a CMT would have the authority to adjust the grievance or that a CMT has ever actually been involved with the grievance procedure. The Employer relies, in part, on an incident described by a CMT at hearing. The CMT attempted to speak to a CNA about trays that had not been distributed to patients. The CNA refused to speak to the CMT. As the Director of Nursing was not yet in, the CMT asked the CNA's shop steward to speak to her. The shop steward attempted to do so. Eventually, the Director of Nursing arrived and straightened the matter out, speaking to all individuals involved. No authority to adjust grievances can be inferred from this incident or the Employer's bare assertions that this authority exists. *Sears, Roebuck & Co*., supra Accordingly, I find that the Employer has not met its burden of proof and that the CMTs are not supervisors as defined in the Act.

Appropriate Unit

The Employer contends that a separate unit consisting of CMTs is not appropriate and that the only appropriate unit must include CNAs as well as CMTs. The record establishes that on November 30, 1993, after an election conducted pursuant to a stipulated election agreement, the Board certified Local 50 as the exclusive representative of the following unit:

> All employees employed as nurses aides, activity aides, dietary aides, laundry aides, restorative aides and housekeepers employed at the Employer's St. Louis, Missouri facility, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act.

It is undisputed that CNAs have historically been included in this unit and that CMTs have not. The record establishes that the position of CMT was in existence at the time of the certification and no evidence was presented that the position has changed since the certification. The reason for the exclusion of the CMTs from the unit is unknown.

On August 31, 2001, Local 50 advised the Employer that the Petitioner would serve as Local 50's agent for collective-bargaining purposes. Pursuant to this designation, the Employer and the Petitioner are currently engaged in negotiations for a new contract for the CNA unit. The most recent contract expired on December 31, 2001.

Both the Employer and the Petitioner agree that the CMTs and the CNAs share a community of interest. The Employer contends that this community of interest is so strong that the only appropriate unit must include both CMTs and CNAs and, therefore, the CMTs should not be represented by a different labor organization in a separate

bargaining unit from the CNAs. Since Local 50 is not a party to the instant proceeding, the Employer concedes that clarification of the certified unit to include CMTs is not appropriate in this proceeding. However, the Employer argues that an election is also not appropriate at this time.

The Employer's argument is clearly without merit because Local 50 is not seeking to represent the CMTs. *Fleming Foods,* 313 NLRB 948 fn. 1 (1994) Moreover, despite the obvious community of interest shared by the CNAs and the CMTs, the historical exclusion of the CMTs from the unit and the lack of any recent and substantial change in that position would make their accretion into the certified unit inappropriate. *Bethlehem Steel Corp*., 329 NLRB 243 (1999); *Union Electric Co*., 217 NLRB 666, 667 (1975); *Aerojet-General Corporation,* 185 NLRB 794, 798 (1970) As the CMTs are not an accretion to the certified unit and as no party contends, nor does the record establish, that the CMTs share a community of interest with any other unrepresented employees, I find the petitioned-for unit appropriate for the purposes of collective bargaining. *Carl Buddig & Co*., 328 NLRB 929 (1999); *Fleming Foods*, supra

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